IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' JOINT MOTION TO ENFORCE SCHEDULING ORDERS" [DKT #1759]

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Plaintiff, the State of Oklahoma ("the State"), respectfully submits this response in opposition to "Defendants' Joint Motion to Enforce Scheduling Orders" [DKT #1759] ("Motion"). Defendants' Motion is founded on factual inaccuracies and a clear misapprehension of Fed. R. Civ. P. 26(e)(1), Fed. R. Civ. P. 26(a)(2) and Fed. R. Evid. 703. The State has not violated the Court's scheduling orders. In fact, the State has followed the Rules. Therefore, granting the relief sought by Defendants would be clearly erroneous and contrary to law. Defendants' Motion should be denied in its entirety.

I. Introductory Statement

Defendants raise two main arguments in their Motion, both of which are flawed. First, Defendants argue that it is improper for the State to provide them with supplemental and corrective information (*i.e.*, errata) related to the State's expert reports. Defendants' argument ignores the fact that "[t]he Federal Rules of Civil Procedure anticipate that an expert may have to correct or supplement her reports or amend her deposition testimony. Fed. R. Civ. P. 26(e)." *In re Commercial Financial Services, Inc.*, 350 B.R. 520, 558 (N.D. Okla. Bankr. 2005) (Rasure, J.). In fact, Fed. R. Civ. P. 26(e) clearly *requires* supplementation:

> (1) In General. A party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission -- *must supplement or correct* its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.] . . .
>
> (2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's *duty to supplement extends both to information included in the report and to information given during the expert's deposition.* Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(Emphasis added); *see also* Advisory Committee Notes to 1993 Amendments to Rule 26 ("Revised subdivision (e)(1) *requires* disclosure of any material changes made in the opinions of

an expert from whom a report is required. . . . [W]ith respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to *a duty* of supplemental disclosure under subdivision (e)(1)") (emphasis added). Thus, Defendants' assertion that supplementation and correction of expert reports is improper is squarely contradicted by the plain language of Fed. R. Civ. P. 26(e). Supplementation and correction with the type of errata information at issue here is not only permitted, it is both anticipated and required by the Rules.

The errata that have been provided to Defendants in this case corrected errors or omissions identified by the experts in their respective reports.[1] The errata also have been provided in a timely manner as required by Fed. R. Civ. P. 26(e). Specifically, the errata have been provided one year prior to trial, seven months prior to discovery cutoff, nine months before motions in limine are due, and well before the pretrial disclosures required under Fed. R. Civ. P. 26(a)(3). These errata corrections were made by the experts as they were discovered. The State should not be penalized for complying with the requirements of Fed. R. Civ. P. 26 by timely correcting errors and omissions.

Second, Defendants argue that there is something improper about the State's experts utilizing nontestifying individuals' work in reaching their opinions, and that the State, by not providing Rule 26(a) reports for these nontestifying individuals, has not made adequate expert disclosures. Defendants' argument does not reflect the requirements of Fed. R. Civ. P. 26(a) and does not comport with Fed. R. Evid. 703. The disclosure requirements of Fed. R. Civ. P. 26(a) pertain only to testifying experts. And Fed. R. Evid. 703 plainly allows a testifying expert to

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[1] In their Motion, Defendants address Dr. Johnson. With respect to Dr. Johnson, Defendants were provided a new, updated graph created by Dr. Johnson in advance of his deposition. Dr. Johnson was cross-examined on this topic. This new, updated graph, however, was not provided to Defendants as an errata.

base his opinion on "facts or data" "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Thus, the manner in which the State's experts have used facts and data and the manner in which the State has made its expert disclosures are entirely consistent with the Rules.

II. Factual Background

A. Defendants' characterizations of the State's experts' errata are factually inaccurate

Defendants assert that the State's experts' errata constitute "wholesale re-writes of their expert opinions" and that these errata seek to "bolster, supplement, and even replace those expert opinions." *See* Motion, p. 3. These claims are untrue. As set out in the attached expert declarations and the discussion below, isolated errors and omissions were contained in some of the State's experts' reports. These isolated errors and omissions were identified by the State's experts, were timely corrected and have been satisfactorily explained.

1. Dr. Bernie Engel

Dr. Engel submitted his expert report on May 22, 2008. Ex. 1 (Engel Decl., ¶ 2). On September 4, 2008, Dr. Engel's errata were submitted to Defendants. *Id.* at ¶ 4. Dr. Engel's errata pertain to only two of the ten substantive sections of his report, and primarily address Section 10 and Appendix D of the report, which both relate to hydrologic / water quality modeling known as "GLEAMS." *Id.* As explained in his declaration, the errata corrected a coding error that affected the execution of the GLEAMS modeling. *Id.* at ¶¶ 5-9. The correction did not result in a change to Dr. Engel's fundamental opinions or conclusions. *Id.* at ¶¶ 4-9.

Dr. Engel evaluated phosphorus loading to the IRW by use of the GLEAMS model. *Id.* at ¶ 5. The GLEAMS model utilizes hydrologic response units ("HRUs") as part of the formula to calculate phosphorus contribution to watershed streams. *Id.* A mistake in the code concerning

which HRUs were to be included in the GLEAMS model was made. *Id.* at ¶ 6. The error in the code was discovered in the spring, 2008. *Id.* at ¶ 8. The code was corrected and the GLEAMS model was rerun (which revised the GLEAMS modeling results) prior to producing the modeling runs to Defendants. *Id.* Defendants have had the correct GLEAMS outputs and the supporting files since May, 2008. *Id.* at ¶ 12. However, the resulting minor changes to the modeling results were not reflected in Dr. Engel's report. *Id.* at ¶¶ 8-9. The errata simply carries the corrected results into Dr. Engel's report. *Id.* at ¶ 9.

In their Motion, p. 4, Defendants allege that Dr. Engel's errata "in effect presents Defendants with an entirely new report . . . ." This is simply not true. As described above, eight of the ten substantive sections of the report remain unchanged, as do six of seven of the report's appendices. *Id.* at ¶ 11. The overall effect of the errata on Dr. Engel's report is demonstrated by the minor changes in the Executive Summary / Conclusions section. *See* Ex. 1 (redlined attachment to Engel Decl.). Section 10 and Appendix D -- which relate to the GLEAMS modeling -- are the only other areas of the report in which changes to figures and tables and numerical values mentioned in the text were made as a result of the corrected modeling runs. *Id.* at ¶ 11. The figures, tables and text in Section 10 were modified only to reflect changes resulting from revisions in the HRU code described above. *Id.*

Defendants also argue that "Defendants and their experts will have to essentially start over, trying to match the results revealed in the new report [Errata] against the output of new model runs using the data on which the new report purportedly relies, and begin their new analysis from this starting point . . . ." Motion, p. 4. This argument is incorrect in several respects. Again, Dr. Engel did not produce a new report and 8 of 10 sections of his report were not modified. Ex. 1, ¶ 12. Further, Defendants have had the correct GLEAMS outputs and the

supporting files since May, and that information has not changed. *Id.* Because they have had the correct GLEAMS files since May, Defendants should have already produced the results that are in the errata. *Id.*

2. Dr. Scott Wells

Dr. Wells submitted his report to Defendants on May 29, 2008. Dr. Wells submitted his initial errata to Defendants on August 26, 2008, and a second errata on September 30, 2008. In their Motion, p. 6, Defendants assert that "Dr. Wells' errata appears to substantially alter several of his conclusions regarding the water quality conditions predicted by his model under a variety of scenarios, conclusions that are central to Plaintiffs' [sic] claims regarding the impact of poultry litter on the IRW." Defendants' assertion is a mischaracterization. The errata prepared by Dr. Wells presented no new topics. Further, the fundamental opinions and conclusions in his report remain unchanged. Ex. 2, (Wells Decl., ¶¶ 5, 6 & 9). Except as set out below, the errata merely corrected typographical errors and inadvertent omissions.

There was an error in the ratios for chlorophyll a to algae and the total phosphorus to organic matter. These ratios are used in two places in the model. The respective ratios should be the same in both places, but they inadvertently were not. After submission of his report, Dr. Wells discovered the errors, made the corrections, and reran the model reflecting the changes in his initial errata. *Id.* at ¶ 7.

Dr. Wells also discovered an error that caused the lake water level to drift upwards about 1 foot at the conclusion of a 50-year simulation. This mistake was corrected and the long-term simulations were rerun to assure that none of the results in the report were affected by the mistaken upward drift in the water level. *Id.* at ¶ 7.

The correction of the ratio errors and the water level drift had a minor impact on his report and did not affect his conclusions. *Id.* at ¶ 5.

Lastly, Dr. Wells relied on Dr. Engel's modeling of the upstream conditions for the purposes of modeling the six scenario 50-year runs in his report. *Id.* at ¶ 8. The changes caused by Dr. Engel's errata meant that Dr. Wells had to re-run his model with Dr. Engel's corrected information. *Id.* However, the revisions to Dr. Wells' report following the model reruns did not alter Dr. Wells' fundamental opinions or conclusions. *Id.* at ¶ 9.

3. Dr. Jan Stevenson

On May 22, 2008, Dr. Stevenson's expert report was submitted to Defendants. *See* Ex. 3 (Stevenson Decl., ¶ 2). Dr. Stevenson submitted a first errata on August 5, 2008, and prepared a second errata on September 26, 2008. *Id.*

The first errata consist mostly of clarifying corrections, corrections of typographical and grammatical errors, and corrections of inadvertent omissions. *Id.* The first errata also included a corrected calculation Dr. Stevenson discovered after he submitted his report. Dr. Stevenson determined that his method of calculating the expected change of total phosphorus concentrations -- a linear regression of Dr. Engel's modeling results -- included a miscalculation and was not as straightforward as the long-term averages that are also predicted in Dr. Engel's model. *Id.* Therefore, the correction made by the first errata was the use of Dr. Engel's long-term averages rather than a linear regression.

The second errata became necessary after Dr. Engel reran his model to correct the above-discussed coding error. *Id.*

Dr. Stevenson's overall conclusions and opinions are the same. *Id.* at ¶ 4. And with regard to the future effects of these modeled management scenarios, the effect trends remain the

same. *Id.* Dr. Stevenson's errata were not intended to "bolster" his opinions. *Id.* These errata were made to correct errors and omissions. *Id.* Given that the errata have been provided to Defendants well in advance of Dr. Stevenson's deposition, which is currently scheduled for November 4-5, 2008, Defendants will have ample time to evaluate the errata.

4. Dr. Roger Olsen

On May 14, 2008, Dr. Olsen submitted his expert report consisting of 184 pages of text (including table of contents), 73 tables (120 pages), 150 figures and six appendices (219 pages). Ex. 4 (Olsen Decl., ¶ 2). On June 2, 2008, Dr. Olsen produced three figures that were referenced in the body of the report, but were inadvertently not attached to the report. *Id.* On July 25, 2008, Dr. Olsen submitted an 11-page errata. *Id.* Defendants took Dr. Olsen's deposition on September 10-11, 2008. *Id.* On September 24, 2008, Dr. Olsen submitted a second errata to reflect the correction of errors that were discussed during his deposition and provide a corrected figure. *Id.* These errata involve only the correction of insignificant typographical and calculation errors and inadvertent omissions. *Id.*

Dr. Olsen states:

> These Errata items . . . did not change my opinions, did not provide any new type of analysis or opinions, did not use new methods, did not provide any new sections to my Report and did not provide any new data. My errata were not intended to "bolster" my opinion. These errata were made to correct inadvertent errors and omissions. My analysis, conclusions and opinions are the same.

Id. at ¶ 13.

Defendants' Motion, p. 8, asserts that the errata are "substantive" and contain "new sections of text and the replacement of several tables and charts." As Dr. Olsen explains, in the errata: figures were supplied that were referenced in the text but omitted from the report; textual changes were made for the purposes of accurately summarizing corrected data; a sampling

location and procedure that were accidentally omitted in the report were described; an incomplete explanation of waste comparison methods was clarified; and minor sample counting errors on p. 6-60 of the report and its accompanying figures (6.11-22a & 6-11-22b) were corrected. Ex. 4, ¶¶ 5-11.

Dr. Olsen's errata were not intended to bolster. Indeed, the errors in the two replacement tables (Tables 6.4-7a and 6.4-7b) consisted of "incorrect usage of the percent solids of the poultry waste and use of tons as metric tons (kg) instead of avoirdupois pounds." *Id.* at ¶ 10. While it is true that these corrections do result in changing Dr. Olsen's phosphorus leachate calculations of cattle v. poultry contribution (they increase the cattle share from 7.4-13% to 10.7-18.3% and reduce poultry from 87-92.6% to 81.7-89.3%), these corrections do not alter Dr. Olsen's conclusions. *Id.*

5. Dr. Bert Fisher

In their Motion, p. 9, Defendants claim that Dr. Fisher's errata ". . . completely rewrote his conclusion 18" and "radically change the conclusion, altering results by factors of up to 10,000 . . . ." This claim is misleading. Dr. Fisher's opinions and conclusions (including conclusion 18) were not changed in the errata. Ex. 5 (Fisher Decl., ¶ 8). While the errata do contain revised text, the revisions show corrected numbers based on calculation errors which Dr. Fisher discovered when he began preparing for his deposition. *Id.* at ¶¶ 6-8.

The errata relate to the calculations that support Dr. Fisher's conclusion 18 in his report that the chemical composition of poultry waste is distinctly different from that of cattle waste and from that of waste water treatment plant effluent. *Id.* This conclusion is based on a comparison that shows that the ratios of waste constituents in poultry waste are significantly different than the ratios of the same waste constituents in cattle waste and waste water treatment

plant effluent. Although the corrected ratios given in the errata are in some instances individually different for poultry waste, cattle waste or waste water treatment plant effluent, overall and in combination, substantial differences remain between one or more of these ratios among poultry waste, cattle waste and waste water treatment plant effluent. *Id.*

Following his deposition Dr. Fisher submitted a second errata correcting typographical errors and a computation error. Specifically, the computation of the parameters for poultry waste was presented in Table 10 of the report on an "as received" basis, and had not been adjusted for moisture content. *Id.* at ¶ 10. Correcting the measured chemical parameters for poultry waste from an "as received" to a "dry weight" basis did not result in altering any opinions presented in Dr. Fisher's report.

In sum, these errata did not result in any change to Dr. Fisher's opinions. *Id.* at ¶¶ 8-11.

6. Drs. Dennis Cooke and Gene Welch

The errata submitted by Dr. Welch (July 24, 2008 and August 13, 2008) clarified misstatements in the text, correct placement of references cited and supply data left out of the appendix. Ex. 6 (Decl. of Welch, ¶ 2). The errata submitted by Dr. Cooke (August 1, 2008) simply corrected some typographical errors and replaced early versions of two tables that were inadvertently included in the report. Ex. 7 (Decl. of Cooke, ¶¶ 3-4). These errata submitted by Drs. Cooke and Welch did not change any of the opinions or conclusions in their report. Ex. 6, ¶ 3; Ex. 7, ¶ 4.

Dr. Cooke submitted a second errata on September 30, 2008, that took into consideration Dr. Wells' second errata. This errata reflects only minor changes to Dr. Cooke's opinions and conclusions in the report. Ex. 7, ¶ 10.

B. Defendants' assertion that the State's experts did not author their respective reports is incorrect; moreover, the State's experts have fully disclosed the foundational expert work upon which they base their opinions

Contrary to Defendants' assertion, the State is not "withholding" key expert information. *See* Motion, p. 10. The authors of the respective expert reports have been fully disclosed, as has the foundational work upon which the State's testifying experts base their opinions.

For instance, Defendants assert that the assistance received by Dr. Welch constitutes work done by "undisclosed experts." However, as the declarations of Drs. Cooke and Welch make clear, except for five paragraphs on pages 39-40, Drs. Cooke and Welch were the authors of their report. *See* Ex. 6, ¶¶ 4-5 and Ex. 7, ¶ 8. The examples cited by Defendants of "undisclosed experts" do not show that the State has withheld any information. Rather, Dr. Welch, as well as the other experts identified by Defendants, had assistance from competent individuals whose work was supervised, requested and performed under Dr. Welch's direction and control. Ex. 6, ¶¶ 4-6.

For example, Defendants complain that two individuals -- *who were named in the report* -- performed the calculations and prepared the first draft of these five paragraphs, which were edited by Dr. Welch. Ex. 6 at ¶ 5. Dr. Welch has published peer reviewed scientific papers concerning the topic addressed in these paragraphs -- phosphorus concentrations in rivers and streams -- and understands this type of analysis. *Id.* at ¶ 5. Dr. Welch also directed the work of Dr. Tony Gendusa and other CDM scientists, who created figures and tables at Dr. Welch's request, direction and control. *Id.* at ¶¶ 5-6. As noted by both Drs. Cooke and Welch, utilizing competent scientists to conduct computations and construct illustrations for a report produced and authored by another scientist is customary practice in research and scientific reporting. *Id.* at ¶ 7 & Ex. 7 at ¶ 7.

Defendants also complain about Mr. King and Dr. Jim Loftis' statistical analysis work after the completion of Dr. Welch's report. This work was performed at Dr. Welch's request. It was not offered as errata. Dr. Welch only discussed this work with Defendants at their prompting during his deposition. Ex. 6 at ¶ 9. Nothing in the Rules prohibits an expert from checking his work and analyses. Drs. Welch and Cooke co-authored their report and the opinions set forth therein are wholly their own.

Defendants also complain that Dr. Tim Cox prepared an appendix to Dr. Engel's report. As expressly stated on Appendix C to Dr. Engel's report, "[t]he analyses described in this Appendix were a *collaborative* effort of Dr. Roger Olsen, Dr. Tim Cox, and Dr. Bernard Engel." *See* Ex. 8 (App. C to Engel Rpt.) (emphasis added). The analyses contained in the Appendix were analyses that Drs. Olsen and Engel were involved in, and the Appendix expresses the opinions of each of these experts. It is noteworthy that any of these scientists could have properly performed the work discussed in Appendix C, and Dr. Engel was actively engaged in this analysis.[2] Ex. 1 at ¶ 3.

C. Defendants mischaracterize the role of the State's continuing sampling and analysis program

Defendants complain that the State continues to produce "new sampling data collected by their experts for this litigation." *See* Motion, p. 2. It is unclear whether Defendants' complaint is that the State is continuing to produce such data, or that the State is continuing to conduct sampling. If the former, it bears remembering that the State is under a court order to continue producing any new sampling data it generates on a rolling basis. If the latter, nothing in the

[2] Moreover, the State disclosed Dr. Cox's involvement with Dr. Engel's report. Neither the State nor its expert attempted to "hide the ball." Indeed, the State has provided all information sought with respect to Dr. Cox (with the exception of his billing rate) prior to the date Defendants filed their Motion and have since provided his billing rate. Finally, the State will offer Dr. Cox for deposition should Defendants wish to depose him.

scheduling orders or Rules precludes the State from continuing its sampling program. Thus, Defendants' suggestion that the State's continuing sampling program and production of data from that program is somehow prejudicial should not be credited.

Finally, it is important to note that these new data have not been used in the errata provided by the State's experts.

D. The production of the overwhelming majority of the State's experts' considered materials has been timely, and the State has quickly rectified any problems that have been brought to its attention

Defendants complain that the State continues to produce materials considered by its experts. Motion, p. 12. Defendants' complaint on this topic fails to explain how any supplemental production has prejudiced Defendants, and also fails to acknowledge that approximately 98% of materials considered by the States' experts were produced in accordance with the disclosure deadlines. The relatively minuscule amount of material that has been supplemented since that time (approximately 2%) has not created any undue burden or prejudice for Defendants as the State has quickly rectified any problems that have been brought to its attention.[3]

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[3] Defendants specifically mention supplements of considered materials for witnesses Dr. Stevenson and Mr. King. In the case of Dr. Stevenson, a supplement of his considered materials consisting of 31 files was produced on August 12, 2008. (The initial omission of these files was due to a glitch at one of the State's vendors that was discovered in the course of a QA / QC check the State performed of the production of its considered materials.) These materials are a very small portion of Dr. Stevenson's overall collection of considered materials, and they were produced well in advance of his deposition (which has been scheduled by Defendants for November 4-5). Defendants will have over two months to review these materials prior to taking Dr. Stevenson's deposition, thus this small supplement clearly has not created any prejudice for Defendants.

In the case of Mr. King, counsel for the State believed that all of Mr. King's materials had been gathered until Mr. King recalled during his deposition in July that he had some additional considered materials in his possession. Upon learning that Mr. King had additional materials which had not been provided to the State for production to Defendants, counsel for the State immediately gathered these additional materials from Mr. King and produced them to

E. Defendants' assertion that the meet-and-confers that have occurred with respect to the State's experts "have met only resistance" is incorrect

In the conferences between the parties on issues of expert errata the State has been forthcoming, explaining that it has both the right and the duty under the Rules to correct errors in its expert reports. Given the requirements of Fed. R. Civ. P. 26(e), the State's refusal to accede to a request by Defendants not to provide errata does not constitute "resistance." Rather, it simply reflects the State's desire to comply with the Rules.

Likewise, Defendants' assertion that the State's straightforward and timely response to two yes-or-no questions posed by Defendants somehow constitutes "resistance" is unfounded. *See* Motion, p. 13-14. Defendants asked the State (1) whether it was representing that all the changes and additions in the errata reports for the State's experts were the product of newly discovered information which was not in existence or reasonably available to the State's experts at the time they submitted their expert reports, and (2) whether it interpreted Fed. R. Civ. P. 26(e) as granting the State's experts an unlimited license to continue between now and the pretrial disclosure deadline to collect additional data, complete new analysis and run additional modeling scenarios and modify their opinions based upon that work. *See* Motion, Ex. 14. The State answered "no" to both of these questions. This was entirely correct. As demonstrated in this Response the State has a right and duty to submit the errata to correct its expert reports. Simply because the State is unwilling to accede to factually unfounded and legally unsupported demands by Defendants does not make the State uncooperative.

III. Argument

A. The State's errata do not violate the Court's scheduling orders

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Defendants. As Defendants are well-aware, Mr. King's deposition has been left open for Defendants to address these materials.

The errata provided by the State's experts are consistent with and mandated by Fed. R. Civ. P. 26(e). Fed. R. Civ. P. 26(e)(1) provides that:

> A party who has made a disclosure under Rule 26(a) . . . *must* supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is *incomplete or incorrect*, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court.

(Emphasis added.) This requirement specifically pertains to expert reports. *See* Fed. R. Civ. P. 26(e)(2). Thus, Fed. R. Civ. P. 26(e) clearly creates a "limited exception to the deadlines provided in Rule 26(a)(2)(C), [by] requiring that an expert witness supplement his report" under certain circumstances. *Minebea Co., Ltd. v. Papst,* 231 F.R.D. 3, 6 (D.D.C. 2005).

As detailed above, the State's expert errata were submitted to correct errors and omissions discovered after the expert report deadline. Under Fed. R. Civ. P. 26(e), the State was duty-bound to submit the errata, and its discharge of that duty does not violate the scheduling orders. In fact, there can be no disputing that the State's conduct fully comports with Fed. R. Civ. P. 26(e) and the caselaw applying that Rule. *See, e.g., Minebea,* 231 F.R.D. at 7-8 (rejected motion to strike portions of supplemental expert report that were submitted in order to "correct an earlier figure which the expert . . . deemed to be inaccurate or incorrect"); *Talbert v. City of Chicago,* 236 F.R.D. 415, 423-24 (N.D. Ill. 2006) (denied motion to bar supplemental report, noting that "where the plaintiff learned its initial expert report might be incomplete under Rule 26(e)(1) . . . the duty to supplement was triggered"); *Schumacher v. Tyson Fresh Meats, Inc.,* 2006 WL 47504, *6 (D.S.D. Jan. 5, 2006) (denied motion to exclude rebuttal report, reasoning that Rule 26 requires "changes or corrections to expert reports . . . when the expert learns that his original calculations are or may be incorrect"); *Cooper v. Memphis Area Medical Center for Women,* 2005 WL 5985410, *2-3 (W.D. Tenn. Oct. 21, 2005) (denied motion to strike supplemental

report because Rule 26(e) required supplementation where expert acquired information concerning a sonogram that made initial disclosures "incomplete or incorrect"); *Wang v. Chinese Daily News, Inc.*, 2006 WL 5112614, *1-2 (C.D. Cal. Oct. 24, 2006) (denied motion to exclude on Rule 26(e) grounds in part because "supplemental reports constituted corrections of calculation errors, the inclusion of data mistakenly omitted, and responses to requests made by defense counsel"); *Presstek, Inc. v. Creo, Inc.*, 2007 WL 983820, *5-6 (D.N.H. March 30, 2007) (refused to strike portion of supplemental report which corrected expert's initial erroneous measurements).

As established above, the State's experts in this case have conducted scientific research and analysis which is highly technical, detailed and data-driven. The errata at issue are merely the result of the State's and its experts' diligence and commitment to complying with Rule 26(e). The errata are to assure that the expert disclosure information given to Defendants is as accurate and precise as possible. In submitting the errata, the State does not seek to gain any unfair advantage. The State is simply seeking to present the Court and Defendants well in advance of trial with the most accurate information possible.

"By mandating supplementation, Rule 26(e) seeks to prevent surprise at trial" and the submission of a supplemental report which "fully informs the recipient of the anticipated testimony of the expert accomplishes that very purpose." *Talbert,* 236 F.R.D. at 421. Here, the discovery cutoff date is April 16, 2009, and trial is set for September, 2009. The errata fully inform Defendants of the anticipated testimony approximately one year before trial, preventing any element of surprise. By contrast, in *Minebea*, the Court permitted some supplementation as compliant with Rule 26(e), even though the supplemental report at issue was submitted one week into trial. *See Minebea,* 231 F.R.D. at 5 & 7-8. Even one week *into* trial, the *Minebea* Court

determined that correctional information in the plaintiff's supplemental report would not "prejudice [defendant] by impairing [his] ability to prepare for cross-examination of [the expert]." *Id.* at 7. The State's experts' errata, submitted well before trial, will not impair Defendants' ability to fully vet each of the State's experts.

Defendants attempt to analogize the instant case with the situation presented in *Quarles v. United States*, 2006 U.S. Dist. LEXIS 96392 (N.D. Okla. Dec. 5, 2006), even though the facts of this case are entirely different from the facts in the *Quarles* case. In *Quarles*, the plaintiffs timely filed a 21-page report by Dr. Berton Fisher, which included three pages of Dr. Fisher's opinions and thirteen pages discussing the bases for those opinions. Approximately five months later, after the defendants had filed their expert reports, and on the day before the scheduled deposition of Dr. Fisher, the plaintiffs filed a second report by Dr. Fisher and 700 new pages of data regarding testing that had taken place since the earlier draft of the report was filed. The voluminous new testing data was not previously disclosed in any manner, and the second report included new opinions on topics not addressed in the previous report. Finding that the second report was an attempt to bolster perceived weaknesses in the first report in reaction to critiques from defendants' experts, and that no other sanction was appropriate in light of discovery being closed in the case, the Court struck Dr. Fisher's second report.

The facts of the instant case are easily distinguishable because information contained in the various errata are corrections to topics contained in the State's timely expert reports. No new opinions have been added in the errata, and no new testing has been relied upon. Further, the errata have been provided prior to the Defendants' expert report deadlines, well before the close of discovery, a full year before this case is set for trial and well before the Fed. R. Civ. P. 26(a)(3) deadlines.

Defendants' arguments also rely upon *Cohlmia v. Ardent Health Servs. LLC*, 2008 WL 3992148 (N.D. Okla. Aug. 22, 2008), which is likewise easily distinguishable from the instant case. In *Cohlmia*, the plaintiffs filed three expert reports that the defendants moved to strike on the grounds that the reports failed to meet the requirements for expert disclosures set forth by Fed. R. Civ. P. 26(a)(2). The reports failed to explain the data upon which the expert opinions were reached, and the process by which the opinions were reached. One expert provided only a cursory opinion in his report, and another report simply listed seven areas to which the expert would be willing to testify. The plaintiffs argued that they should be able to supplement the reports pursuant to Fed. R. Civ. P. 26(e) to cure the deficiencies. The Court rejected this idea, holding that Fed. R. Civ. P. 26(e) did not to permit a party to file insufficient initial reports and then provide basis and reasoning for those reports at a later date. The Court also explained that supplementation was not feasible due to the impending close of discovery and dispositive motions deadline.

The instant case is nothing like *Cohlmia* because the reports of the experts in this case fully comply with Fed. R. Civ. P. 26(a)(2). The errata that have been provided to Defendants are not seeking to cure Rule 26 disclosure deficiencies, but to make corrections discovered by the experts themselves. The State is not attempting to add material to the expert reports in an attempt to achieve compliance with Fed. R. Civ. P. 26(a)(2), but rather is trying to correct relatively minor errors and omissions in the reports so that the opinions before the Court are fully accurate.

B. The State's expert disclosures are entirely consistent with Fed. R. Civ. P. 26(a)(2) and Fed. R. Evid. 703

Defendants argue that the State has withheld "vital information concerning previously undisclosed additional experts on whose opinions Plaintiffs [sic] intend to rely." *See* Motion, p.

10. Defendants further argue that the State is required to make disclosures for all "substantive report authors." *See* Motion, p. 17. Nowhere, however, does Fed. R. Civ. P. 26 or the scheduling orders require expert disclosures for non-testifying experts. Specifically, Fed. R. Civ. P. 26(a)(2)(A) requires a party to disclose "the identity of any witness it may use *at trial* to present evidence under Federal Rule of Evidence 702, 703, or 705" (emphasis added). Fed. R. Civ. P. 26(a)(2)(B) requires a report containing certain information from a witness "retained or specially employed *to provide expert testimony* in the case." (Emphasis added.) The State does not intend to call any of the individuals identified by Defendants as "undisclosed additional experts" to testify at trial during its case in chief.[4] Therefore, the State has met all of its disclosure obligations under Fed. R. Civ. P. 26 and the scheduling orders. Moreover, Fed. R. Evid. 703 allows a testifying expert to base his opinion on "facts or data" "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." That is precisely what has occurred here. Certain non-testifying individuals assisted certain of the disclosed testifying expert witnesses in the preparation of their respective reports.

Defendants rely solely upon *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002), and *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558 (S.D.N.Y. 2007), for the proposition that the State has not met its obligations under Fed. R. Civ. P. 26 and the scheduling orders. Those cases are simply inapplicable to the instant case. In both of these cases, experts were testifying about work done by other experts that they themselves were not

[4] The State has not yet identified individuals whom it intends to use for rebuttal and expressly reserves the right to make any additional disclosures in compliance with the Rules.

qualified to undertake. Such is not the case here. The State's experts here sought the assistance of others to perform work under their direction and supervision.[5]

The case here is much more akin to the numerous mainstream cases acknowledging the propriety of testifying experts relying upon the assistance of staff, employees and other scientists. *See, e.g., Larsen v. Kempker*, 414 F.3d 936, 941 (8th Cir. 2005); *McCloud v. Goodyear Dunlop Tires North America, Ltd.*, 479 F.Supp.2d 882, 889 (C.D. Ill. 2007) (distinguishing from *Dura Automotive, supra*, because it involved a gap between the data and the expert testimony where the expert lacked knowledge of mathematical models); *McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F.Supp.2d 30, 37-38 (D.D.C. 2004) (allowing testimony where expert orchestrated the analysis); *Bowoto v. Chevron Corp.*, 2006 WL 1627004, *3-4 (N.D. Cal. June 12, 2006) (distinguishing *Dura Automotive* by finding that the expert's assistant at issue did not exercise judgment "beyond the expert's ken"); *Schumacher*, 2006 WL 47504,*7 (allowing Tyson and Cargill entities' expert to testify regarding a regression analysis conducted by another expert).[6]

As explained in detail in Section II.B., *supra*, the State's experts have directed and collaborated on the work conducted by assistants and other scientists, and none of the work conducted by non-testifying individuals is work that the State's experts could not do themselves.

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[5] While Defendants attempt to argue that Dr. Olsen's citation to the expert reports of Drs. Harwood, Brown and Fisher is inappropriate or somehow prohibited by the Rules, this is a red herring. Dr. Olsen's weight of the evidence approach is a generally accepted method of determining causation in environmental litigation. Moreover, Drs. Brown, Harwood, and Fisher have been designated and fully disclosed as testifying experts.

[6] As the Tyson and Cargill entities in the *Schumacher* case argued, "[A]gricultural economists routinely obtain assistance from econometricians. An expert is free to rely on any facts or data 'reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,' . . . and that is exactly what Professor Koontz did." Ex. 9 (Def. Br. in *Schumacher*, p. 2).

Any work performed by others in preparing the report was done at the experts' request and is the type of work normally relied upon by such experts. Nothing in the rules prohibits an expert from having a "second pair of eyes" to verify an expert's conclusions or analysis. Indeed, an expert utilizing other professionals, such as Dr. Loftis and Mr. King, to ensure that his own work is accurate not only is allowable, but also demonstrates good science. Additionally, it should be noted that to date, Defendants have received all of the information required under Rule 26(a)(2), even though that information is not required for non-testifying individuals.

Significantly (and hypocritically), Defendants seek to preclude the State's experts from obtaining the very type of assistance obtained by their own experts in the preliminary injunction hearing. For instance, Defendants' expert Dr. Timothy Sullivan testified as follows:

> Q. You didn't go to the website at USGS and download the stage discharge flow information?
> A. I had discharge information from USGS that I used in many of my analyses. I don't believe that the stage data were downloaded unless they came along with it automatically. The analyses that I did for this case that involved flow data, *I had those analyses done by a data analyst who would have gone to USGS.* I don't think he got it from the website. I think he had someone at USGS send it to him directly. It was either one of those, and then he would have been the one who actually did the computer analyses of the data. That's why I have data analysts to do that for me.
> Q. Okay. That's great. So are you familiar with the USGS website to get data?
> A. I've never gone to the USGS website to get data. *Again, I have a number of data analysts that work for me, and that's why I have them.*

March 11, 2008 PI Hearing Tr., at 2296:11-2297:4 (emphasis added).

The reality is that -- just like the work done by Defendants' expert Dr. Sullivan -- every instance where the State's experts have relied upon the work of others as a basis of their opinions or testimony falls squarely within the ambit of Fed. R. Evid. 703 and is wholly appropriate; no report from non-testifying individuals is required under Fed. R. Civ. P. 26(a)(2).

C. Not only are claims that the State has acted improperly wholly unfounded, Defendants' claims of prejudice are entirely without merit

Absolutely *nothing* in the Rules supports the proposition that a supplementation made pursuant to Fed. R. Civ. P. 26(e) constitutes either a violation of a scheduling order under Fed. R. Civ. P. 16 or a failure to disclose under Fed. R. Civ. P. 26(a)(2). Thus, Defendants' attempts to invoke the remedies afforded under Fed. R. Civ. P. 16 and 37 are unfounded.[7] The truth of the matter is that the State's expert reports were timely disclosed, these reports contained full and complete statements of the experts' opinions, the overwhelming majority of the experts' considered materials were timely produced (and when inadvertent omissions in the productions were brought to the State's attention those omissions were quickly rectified), and the errata that have been provided do not contain new opinions and do not rely upon new data. The State's Fed. R. Civ. P. 26(e) supplements were not only fully justified under the circumstances, and but also, in fact, mandated by the Rules. Clearly, there can be no penalty for obeying the Rules.

Moreover, there is no basis for Defendants' claims of "harm." The State's errata have been provided *a year* before trial, before Defendants' experts are scheduled to make their disclosures, and well before the Fed. R. Civ. P. 26(a)(3) disclosure deadlines. The State has acted with good faith, and simply wants the Court and Defendants to have the most accurate information possible.

Defendants cannot credibly argue surprise or prejudice. Indeed, the only "prejudice" Defendants could potentially suffer is that they will be deprived of a "gotcha" moment on cross-examination of the State's experts. The timing of the disclosures of the errata -- *which, to repeat,*

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[7] Even assuming arguendo that the Court were to engage in a Fed. R. Civ. P. 16 or 37 analysis (which under the circumstances would be clearly erroneous and contrary to law), the fact is that (1) the disclosure of the errata is justified, and (2) Defendants have not been harmed by the disclosure of the errata. *See* discussion, *supra* and *infra*.

do not result in changes of the experts' ultimate opinions that were disclosed in May -- give Defendants' experts more than sufficient time to prepare their expert reports. After all, Defendants' experts have had more than three years to work on their reports. The State's errata affect what is presumably only the small part of those reports that critique the State's experts' opinions.

D. The remedies sought by Defendants are unwarranted and to grant such relief would be clearly erroneous and contrary to law

The remedies sought by Defendants are supported neither by the facts nor by Fed. R. Civ. P. 26 and 37. Indeed, should any relief be granted, this Court should award the State its attorneys fees and costs incurred in responding to Defendants' legally and factually unfounded Motion.

First, the State's experts' errata should not be stricken because the State's errata are entirely consistent with both Fed. R. Civ. P. 26(e) and the caselaw. Indeed, Fed. R. Civ. P. 26(e) mandates that supplementations be made if the State learns that in some material respect the information disclosed in its expert witnesses' reports is incomplete or incorrect. Leave of court is not required for such supplementations. To strike the errata *required* by the Rule would be clearly erroneous and contrary to law. The State should be permitted to make all such supplementations without leave of court that are required or permitted under the Rules.

Second, the State's experts should be permitted to testify as to all disclosed opinions consistent with Fed. R. Evid. 703 since nothing in the Rules requires that an expert's testimony be limited to "their own firsthand opinions." Defendants' request is directly contrary to Fed. R. Evid. 702 and 703 (as well as their own practice). Thus, to preclude testimony on matters that were the subject of a Fed. R. Civ. P. 26(a)(2) disclosure or a Fed. R. Civ. P. 26(e) supplement is

entirely contrary to the purpose of those rules, and would be clearly erroneous and contrary to law.

Third, foundational work relied upon by the State's experts / contained in the State's expert reports should not be stricken. Doing so would be contrary to Fed. R. Civ. P. 26(a)(2) and Fed. R. Evid. 702 and 703 and clearly erroneous and contrary to law.

Fourth, the pretrial schedule should not be modified. The State's errata have been provided before Defendants' experts are scheduled to make their disclosures, many months before the relevant pretrial disclosure deadlines, and a year before trial is even scheduled to begin. Defendants will have had more than three years to prepare their expert disclosures, including, under the present schedule, anywhere from five months to a year longer than the State had to do so. To adjust the pretrial schedule to grant Defendants even more time is not justified. Indeed, to do so would be clearly erroneous and contrary to law.

Because there has been no violation of the scheduling orders, Defendants are not entitled to an award of expert costs or attorney fees. Further, nothing in Fed. R. Civ. P. 26(e) provides for an award of experts costs or attorney fees. To make such an award under the circumstances would, therefore, be clearly erroneous and contrary to law.

IV. Conclusion

WHEREFORE, in light of the foregoing, Defendants' Motion should be denied in its entirety.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL

State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ M. David Riggs
M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice)*
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice)*
MOTLEY RICE, LLC
20 Church Street, 17th Floor

Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice)*
Michael G. Rousseau
(admitted *pro hac vice)*
Fidelma L. Fitzpatrick
(admitted *pro hac vice)*
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov
M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com

Jonathan D. Orent jorent@motleyrice.com
Michael G. Rousseau mrousseau@motleyrice.com
Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

Robert E Sanders rsanders@youngwilliams.com
Edwin Stephen Williams steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Leslie Jane Southerland ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kklee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
FAEGRE & BENSON, LLP

Dara D. Mann dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Paul E. Thompson, Jr. pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
OWENS LAW FIRM, P.C.
Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole Longwell nlongwell@mhla-law.com
Philip Hixon phixon@mhla-law.com
Craig A. Merkes cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

Sherry P. Bartley sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

John Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk rfunk@cwlaw.com
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

Stephen L. Jantzen sjantzen@ryanwhaley.com
Paula M. Buchwald pbuchwald@ryanwhaley.com
Patrick M. Ryan pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

Mark D. Hopson mhopson@sidley.com
Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Thomas C. Green tcgreen@sidley.com
Gordon D. Todd gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP

Robert W. George robert.george@tyson.com
L. Bryan Burns bryan.burns@tyson.com
TYSON FOODS, INC

Michael R. Bond michael.bond@kutakrock.com
Erin W. Thompson erin.thompson@kutakrock.com
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES

Jennifer Stockton Griffin jgriffin@lathropgage.com
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

Robin S Conrad rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov
Counsel for State of Arkansas and Arkansas National Resources Commission

Mark Richard Mullins richard.mullins@mcafeetaft.com
MCAFEE & TAFT
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen

Mia Vahlberg mvahlberg@gablelaw.com
GABLE GOTWALS

James T. Banks jtbanks@hhlaw.com

Adam J. Siegel ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP
Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation

John D. Russell jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC

William A. Waddell, Jr. waddell@fec.net
David E. Choate dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP
Counsel for Arkansas Farm Bureau Federation

Barry Greg Reynolds reynolds@titushillis.com
Jessica E. Rainey jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON

Nikaa Baugh Jordan njordan@lightfootlaw.com
William S. Cox, III wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC
Counsel for American Farm Bureau and National Cattlemen's Beef Association

Also on this 1st day of October, 2008 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall
58185 County Road 658
Kansas, Ok 74347

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

George R. Stubblefield
HC 66, Box 19-12
Proctor, Ok 74457

Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/ M. David Riggs
M. David Riggs